National Dance Institute—New Mexico, Inc. *and* Diana M. Orozco-Garrett. Case 28–CA–157050

June 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On February 10, 2016, Administrative Law Judge Eleanor Laws issued the attached decision. The Charging Party filed exceptions with supporting argument. The Respondent filed an answering brief, and the Charging Party filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. June 23, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Cristobal Munoz, Esq. and *Chris Doyle, Esq.,* for the General Counsel.

Patricia Salazar Ives, Esq. (Cuddy & McCarthy, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Santa Fe, New Mexico, on December 1–4, 2015. Diana M. Orozco-Garrett (the Charging Party) filed the original charge on July 30, 2015, and an amended charge on September 11, 2015.[1] The General Counsel issued the complaint on October 9. National Dance Institute—New Mexico, Inc. (the Respondent or NDI) filed a timely answer denying all material allegations.

The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating and/or maintaining an overly broad rules regarding employee conduct and threatening employees with reprisal. The complaint further alleges the Respondent violated Section 8(a)(4) and (1) of the Act by failing to assign dance classes to the Charging Party and terminating her employment.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

National Dance Institute—New Mexico, Inc., a nonprofit corporation with an office and place of business in Santa Fe, New Mexico, provides dance classes to students in New Mexico's schools. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7).

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Charging Party's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Charging Party's contentions are without merit.

[2] In adopting the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(4) and Sec. 8(a)(1) by failing to assign classes to the Charging Party and by discharging her, we find it unnecessary to pass on whether the General Counsel carried his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), because we find that the Respondent met its rebuttal burden of proving it would have terminated the Charging Party even if she had not filed a charge with the Board or engaged in any protected concerted activity.

Additionally, we adopt the judge's dismissal of the allegation that the "Expectations for Employee Conduct" rule violated Sec. 8(a)(1), in the absence of argument on exceptions addressing the specific language alleged to be unlawful. Further, in the absence of exceptions, we adopt the judge's dismissal of allegations that the Respondent's July 31 email to the Charging Party promulgated an unlawful rule and constituted an unlawful threat.

[1] All dates are in 2015 unless otherwise indicated. The Respondent filed a motion to correct the transcript, which the General Counsel opposed. Many of the corrections are simple typos. With regard to any material changes in testimony, I have relied on the official transcript and not the Respondent's proposed amended transcript.

II. STATEMENT OF FACTS

A. Background and the Respondent's Operations

NDI's headquarters are in Santa Fe, and it also has offices in Albuquerque. It serves students across the State of New Mexico.

NDI has an outreach program in public elementary schools, targeting schools with families living in poverty. It runs for 30 weeks, and consists of NDI sending a teacher and a pianist into a public elementary school once a week for 30 weeks. Classes are 50 minutes long and have specific curriculum. Students in this program can audition for the Super Wonderful Advance Team (SWAT), which meets on Friday afternoon or Saturday morning for approximately 30 weeks during the school year. All students in the outreach program and on the SWAT team participate in one of two year-end performances at NDI's Santa Fe facility, referred to as the dance barns. NDI also has after school, weekend, and summer programs.

NDI's purpose is broader than simply teaching dance. NDI strives to help children develop self-discipline, a standard of excellence, and a belief in themselves that will carry into all aspects of their lives. (Tr. 203–204; R. Exh. TT.)[2] Students are taught to adhere to the "core four": work hard, do your personal best, never give up, and choose a healthy lifestyle. (Tr. 41.) NDI's tagline is "teaching children excellence." (Tr. 203.) NDI's core values are a belief in children, social responsibility, excellence, sustainability, and financial integrity. (Tr. 11.)

At all relevant times, Russell Baker has been NDI's executive director. He reports to NDI's Board of Directors, chaired by Diane Doniger. Maria Wolfe is NDI's director of business and administration, with oversight of NDI's human resources function. Liz Salganek is NDI's artistic director, with responsibilities overseeing all of the artistic programs around the State. Emily Lowman is the Santa Fe outreach artistic director, responsible for the year-end performance. Melissa Briggs directed the Santa Fe Summer Institute during the summer of 2015. Alison Montoya is the Santa Fe program producer. In this capacity, she administrates the program in Santa Fe and assists with the year-end production. She conducts three annual meetings at each of the schools that participate in the program: a start-up meeting at the beginning of the school year, an event-prep meeting before the performance, and a wrap-up meeting at the end of the school year.

NDI employs part-time and full-time teachers. The full-time teachers have duties outside the classroom. During the relevant time period there were approximately five full-time teachers and three part-time teachers.

NDI teachers are expected to serve as role models for the constituents they serve. They must participate in a two-week teaching excellence workshop before they start working with students. (Tr. 201–202.) Teachers are expected to exhibit NDI's core competencies of an excellent NDI New Mexico instructor. These competencies are broken down into the following categories: achieving the mission, classroom management, teaching techniques, student-teacher connection, curriculum, modeling, choreography, seeing students, and communication. (R. Exh. B.) Instructors are trained on the competencies when they start at NDI and are also trained annually. (Tr. 201–202.) Instructors are also provided with NDI's teaching excellence manual, which sets forth expectations of NDI teachers. The "core emphasis is on excellence, precision, teamwork, and total physical commitment." If a teacher becomes frustrated and yells at students or otherwise does not model excellence, the teacher is instructed to apologize. (R. Exh. C.) Teachers were also provided with the NDI New Mexico Child Safety and Discipline policy for the 2014–2015 school year. (R. Exh. D.)

B. The Charging Party's Probation and Previous Charges

Orozco-Garrett served as a part-time dance instructor for 14 years. She had taught at Sweeney Elementary School during the 2013-2014 school year. At the start-up meeting at Sweeney on September 9, 2014, the principal complained that Orozco-Garrett had been verbally abusive and disrespectful to her in front of her staff, and had been disrespectful to the teachers. (Tr. 410–411; R. Exhs. NN, OO.) The principal and teachers discussed not having NDI at Sweeney because of Orozco-Garrett's behavior. Montoya and Lowman had attended the meeting, and Montoya sent Lowman and Salganek an email describing what the principal had told them.[3] (R. Exh. EEE; Tr. 664.)

On September 10, 2014, Baker issued Orozco-Garrett a letter of warning and placed her on probation.[4] Orozco-Garrett filed a charge with the National Labor Relations Board (the Board or NLRB) on September 17, 2014, alleging that the Respondent had prohibited employees from discussing their terms and conditions of employment. (GC Exh. 34.) Orozco-Garrett filed another charge with the Board on November 25, 2014, alleging her probation was motivated by discrimination for her protected activities. She also alleged the Respondent had prohibited employees from discussing the terms and conditions of their employment, maintained overly broad work rules, threatened employees, and created the impression that employees were under surveillance. (GC Exh. 35.)

The Regional Director for Region 28 issued an amended complaint on March 10, 2015, alleging the Respondent violated

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for the Respondent's exhibit; "GC Exh." for the General Counsel's exhibit; and "GC Br." for the General Counsel's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

[3] Orozco-Garrett had previously been counseled about behavior similar to what is at issue in the instant complaint. On July 23, 2010, in response to Orozco-Garrett's request for a larger teaching schedule, Baker stated he would consider increasing her workload if her performance and attitude were improved. Specifically, Baker instructed Orozco-Garrett to build a positive collaboration between herself and her supervisor, increase communication and follow-up with her managers by meeting deadlines and attending meetings on time, and build strong and positive relationships with NDI's constituents. (R Exh. UU.)

[4] Orozco-Garrett filed a charge of discrimination with the New Mexico Department of Workforce Solutions, Human Rights Bureau and the Equal Employment Opportunity Commission, alleging her probation was unlawful discrimination based on her national origin. (R. Exh. VV.)

the Act as alleged in the charges. (GC Exh. 36.) The complaint was settled, with the Respondent agreeing to pay Orozco-Garret $213.00 backpay for auditions she was not permitted to attend, revise its Standards of Professional Conduct policy, and delete language in Orozco-Garrett's probation letter that could be construed as prohibiting protected activity. (Tr. 219–221; R. Exh. FFF.) The probationary period and terms otherwise remained the same. (R. Exhs. H, CC, DD.)

Salganek emailed Orozco-Garrett the revised probation letter on March 24, 2015, and offered to discuss it with her. Orozco-Garrett responded, setting forth numerous conditions precedent to discussing the matter with Salganek, and pointing out the legal deficiencies she perceived with the document. (R. Exh. EE.) Orozco-Garrett refused to sign her letter of probation. (Tr. 411, 613.)

The Respondent distributed a notice pursuant to the settlement agreement on March 27, 2015. (R. Exh. G.)

C. Events in February and March 2015

Lowman conducts monthly team meetings for the Santa Fe program. The meetings include the musicians and teachers in the outreach program. (Tr. 387, 454–455.) In February 2015, Lowman sent Orozco-Garrett an email asking her to be on time for future team meetings. Orozco-Garrett had been late for a February 11 meeting because she was teaching a class right before the meeting and stopped to pick up lunch.[5] (GC Exhs. 4, 38.) Other employees have been late to meetings, and Lowman has spoken to them about it. (Tr. 285–287; 461–462.)

During the meeting, Lowman discussed a change to some choreography that would affect the teachers, and said, "Please don't be mad. Don't make a voodoo doll out of me." Salganek heard Orozco-Garret say under her breath, "There's already a voodoo doll of you." Salganek told Orozco-Garrett she would consider future similar comments to be insubordinate. Orozco-Garrett responded, "Of course you would."[6] (Tr. 291–292; GC Exh. 4.) Orozco-Garrett received no discipline for being late for the meeting or for making the voodoo doll comment. (Tr. 295–296.)

In February and March, Orozco-Garrett made suggestions about the artistic aspects of the performance. Among other suggestions, she wanted Hispanic authors to be part of the program because the students NDI serves are predominantly Hispanic.[7] (GC Exhs. 39–41; R. Exhs. MM, PP, WW; Tr. 324, 463–472.)

On March 13 and 15, Baker sent emails notifying employees the Respondent had rescinded the Standards of Professional Conduct policy and replaced it with the Employee Conduct policy. Baker attached the new policy and instructed the employees to review it.[8] (GC Exh. 8; R. Exh. F.)

D. The Year-End Performance

As noted above, the year-end performances for the Santa Fe outreach program take place at the dance barns. The facility comprising the dance barns has six dance studios, two of which convert into a performing arts theater. The year-end performances include students from third–ninth grades, as well as about a group of about 20 kindergartners, for a total of about 500 participants per performance. There are two sets of performances during consecutive weeks, each lasting three days.

Rehearsals take place prior to the performances. Initially, each school is bused to the dance barns separately so the students can get acclimated to the environment. The rehearsals occur in stages: first with just one class, then as a school, and then with all participants. Students who are not performing at a given time wait in holding areas. Generally, when the schools rehearse together, it is the first time students from different schools interact. The schoolteacher for each participating class comes to the rehearsals and the performances. In addition, each school is assigned a "runner" who is responsible for helping students get organized in the holding area, lining the students up for their dances, accompanying them to the stage, waiting for them while they're on the stage, and then they accompanying them back to the holding area. The runners and classroom teachers supervise the students.[9] At any given time, between roughly 40 and 100 kids are in a holding area. Educational assistants assigned to disabled students through the public schools accompany their students to the rehearsals and performances.[10] Other volunteers also help facilitate the rehearsals and performances.

For the 2014–2015 school year, the dress rehearsals occurred on Wednesday, and the performances were Thursday (two morning and one evening performances), Friday (two evening performances), and Saturday (one afternoon and one evening performance).

Some parts of the performance include all students, while other parts involve only some of the students. Near the beginning of the performance, all students participate in "runs and jumps." This involves two lines of students who run onto the stage one at a time, do a jump, and run off the stage. During the May 2015 performance, Orozco-Garrett was stationed upstage right to help direct traffic during runs and jumps, and to ensure the two lines did not run into each other. (Tr. 476–479.)

Pamela Ladas, a part-time instructor, was the NDI dance teacher at Gonzales Elementary School. During the second week of performances, an incident between an NDI instructor and an educational assistant (EA) named Laura Robledo, which allegedly occurred on May 14, was reported to Salganek. Robledo was assisting a visually impaired student from Gonza-

[5] Orozco-Garrett did not attend the March 2015 meeting due to a medical condition. Lowman met with her separately to go over the material that was covered in the meeting.

[6] Right after the meeting, Orozco-Garrett posted the following comment on her Facebook page" "Voo doo hoo doo, you're gonna be doo doo!" (R. Exh. GG.) She also later posted a picture of a voo doo doll with the caption, "Respect the voodoo doll bitches." (R. Exh. HH.)

[7] Orozco-Garrett pointed out to Salganek that her suggestion about Hispanic authors was not included in the minutes of the February 11 meeting. (GC Exh. 41.)

[8] Debbie Baciocco, a human resources specialist, sent the March 13 email on Baker's behalf. According to Wolfe, the NLRB attorney working with NDI on settling the previous complaint approved the language in this version. (Tr. 704.)

[9] Teachers receive a stipend from NDI for their time participating in the event.

[10] Disabled students are integrated into the program, and they are not labeled or otherwise identified to the NDI staff as disabled.

les. Robledo and Ladas approached Salganek, and Robledo told Salganek that an NDI staff member with short dark hair had grabbed her arm so hard it left a bruise, and the staff member had handled her student in a rough manner.[11] Robledo identified Orozco-Garrett as the NDI instructor. (Tr. 326–327.) Salganek informed Orozco-Garrett about the incident, and Orozco-Garrett responded that she never touched anyone.[12] (Tr. 329, 480–481.) Orozco-Garrett approached Robledo the evening on May 14 and told her she had heard there had been an incident with a child. According to Orozco-Garrett, Robledo said the incident had nothing to do with the child. (Tr. 498–499.)

Salganek sent an email to Baker and Wolfe at 5:15 p.m. on May 15, reporting her conversations with Robledo and Orozco-Garrett regarding the incident. (R. Exh. I.) Baker responded to Salganek's email, asking if there was a photo of the bruise and inquiring as to whether any other adults were present. Salganek informed Baker that Ladas was present when Robledo described the incident and identified Orozco-Garrett. (R. Exh. J.)

On May 16, Wolfe and Salganek met with Robledo, who reiterated what she had told Salganek. Robledo said that Orozco-Garrett had apologized to her. She further expressed that she did not want to get anyone in trouble, but wanted to make sure such an incident did not recur. Wolfe took a picture of the bruise and forwarded it, along with her notes from the meeting, to Baker. (R. Exh. K.)

Another incident occurred during the May 14 performance. Instructor Gemetria St. Clair reported to Lowman that she had moved Ms. Lussiez, a teacher from Gonzales, from one spot to another and thought it had disturbed the teacher. St. Clair apologized to the teacher and reported it to Lowman because she felt she had done something wrong and wanted her to know. Lowman reported the incident to Baker and Salganek. (Tr. 408.)

The Gonzales Elementary wrap-up meeting occurred on May 20. Montoya attended on behalf of NDI.[13] When Montoya arrived at the meeting, she saw the principal was there, and she figured there must be a problem because NDI had been at Gonzales Elementary for 16 or 17 years, and the principal did not usually attend the meetings. (Tr. 671.) The complaints about St. Clair and Orozco-Garrett were discussed at the meeting, and the principal stated such incidents could not reoccur. The principal appeared upset to Montoya, and told her he should not have to worry about people coming back from NDI bruised. Various other complaints about the length of the program and its toll on the teachers were also discussed. (R. Exh. M; Tr. 673–674.) After Montoya left the meeting, she informed Salganek about it. (Tr. 674.) Salganek prepared an incident report on May 20, which Baker signed on May 28. (R. Exh. N.)

Baker investigated the incidents involving Orozco-Garrett and St. Clair. (R. Exh. A.)[14] He left a phone message with Orozco-Garrett requesting to meet to discuss the incident. Orozco-Garrett responded in writing May 27, asking what "incident" Baker wanted to discuss. Baker responded that it was the interaction between Orozco-Garrett and the EA from Gonzales, and asked when she was available to meet. (R. Exh. P.) Orozco-Garrett responded on May 28, expressing surprise at the request because she had spoken to both EAs and the children, and was told no such accusation was made. She expressed her belief that she should be commended for avoiding a near catastrophe during the runs and jumps number resulting from Lowman's negligence by failing to properly instruct the blind dancers and their aids. She also criticized Ladas' judgment in her placement of the visually impaired students. Orozco-Garrett said she would meet with Baker only after being fully informed in specific detail regarding the nature of the allegations, who made them, when and where the alleged incident took place, the names and contact information of anyone with personal knowledge, and the evidence to support the claim. Orozco-Garrett also stated that if Wolfe was to be present, she would bring her husband, a retired civil rights attorney, to the meeting. (GC Exh. 11.)

Baker sent Orozco-Garrett an email on May 29, informing her that the purpose of the meeting he requested was to get her perspective on the interaction with the EA from Gonzales Elementary. (R. Exh. Q.) Orozco-Garrett responded on June 3, with an email similar to her May 28 correspondence. (GC Exh. 12.)

On June 8, Baker sent Orozco-Garrett and email stating that NDI had received a complaint on May 15 from EA Laura Robledo about the way Orozco-Garrett handled her backstage during the May 14 performance. He told her the substance of the allegations, and stated that representatives from Gonzales had asked that NDI take measures to ensure it did not happen again. Baker again asked to meet with Orozco-Garrett, and gave her some proposed dates and times. (GC Exh. 12a.) Orozco-Garrett responded later that day, stating that Baker's letter was not responsive to her previous request. She denied that she had engaged in the conduct ascribed to her by Robledo, requested information about how the complaint was made and conveyed up the chain at NDI, and reiterated that Robledo had told her she had made no allegations against her. She also requested specific information about the wrap-up meeting at Gonzales. (GC Exh. 13.)

Baker again requested to meet with Orozco-Garret in an email dated June 16. Orozco-Garrett responded the following day, stating that she was awaiting an evaluation of the request from her attorney before responding. (R. Exh. S.)

Baker sent another email to Orozco-Garrett on Tuesday, June 23, stating he had provided her with the information he had regarding the allegation, and requesting, again, to meet with her. He stated that after they met, he would gather more information and determine if the complaint was valid. He asked her to provide a date and time to meet, and stated that if they could not meet by Thursday, he would consider her May 28 and June

[11] Robledo had initially reported the incident to Ladas, who found Salganek. (Tr. 327.)

[12] She remembered yelling, over the music, that the line needed to keep moving during the first run-through of runs and jumps. (Tr. 487–489.)

[13] As per her usual practice, Montoya took the minutes at the meeting. (Tr. 663, 670.)

[14] The investigations took several weeks due to summer schedules. (Tr. 496–497; R. Exh. A.)

22 emails and attachments to be her response. (GC Exh. 13a.)

On June 29, Orozco-Garrett sent Baker a letter, broken down into enumerated sections expressing her belief that she had been subjected to "[d]isparate treatment, violation of due process, and unconscionable course of dealing." She summarized their previous correspondence and expressed that Baker had not been responsive to her previous requests. She explained that she could not have grabbed anyone because she had an injured left elbow, and during runs and jumps she held out her left arm and pointed with her right hand. Orozco-Garrett again reiterated that Robledo made no allegations against her. She told Baker he was acting in bad faith and stated that she would file complaints with the EEOC and the NLRB if the matter was not closed and any reference to it removed from her personnel file by July 10. (GC Exh. 14; Tr. 481–483.)

Baker responded on July 9, stating he was disappointed Orozco-Garrett was unwilling to meet with him so that he could hear her view of what had occurred on May 14. He informed her that the he would rely on her emails as her response to the allegation, and determine what if any action should be taken. Baker also informed Orozco-Garrett that the matter would only become part of her personnel file if action was taken against her. (R. Exh. T.) Orozco-Garrett emailed Baker on July 13, to inform him that she had never refused to meet with him about the Robledo incident. (GC Exh. 16.)

After his attempts to meet with Orozco-Garrett, Baker began scheduling meetings with others. He spoke with the principal and in-school school coordinator from Gonzales Elementary School. He also interviewed Robledo, Ladas, Montoya, and Salganek, and prepared a report documenting his conversations with these individuals.[15] Baker concluded that Robledo had not fabricated the incident. He noted Robledo's report that Orozco-Garrett had apologized to her, and he found this impossible to reconcile with Orozco-Garrett's denial that anything had occurred. Baker deduced from the nature of Orozco-Garrett's written responses to him that she was avoiding discussing the incident by attempting to cloud and confuse the issues. Baker concluded that Orozco-Garrett had violated the terms of her probation. (R. Exh. A.)

Baker also investigated the St. Clair incident. He interviewed the principal and in-school coordinator from Gonzales, as well as Lussiez. He also spoke with St. Clair, Salganek, Wolfe, and Montoya. St. Clair was very apologetic about her behavior to Salganek and Baker. She had ideas on how to improve in the future and how everyone could work better backstage to avoid such an incident. (Tr. 188; R. Exh. A.)

E. The Summer Programs

Orozco-Garrett taught for NDI's summer program at the dance barns during the last 3weeks of June. (Tr. 153, 497–498.) She also taught at a 1-week program in Artesia, New Mexico in July. (Tr. 143–144.)

F. The Kitchen Sink Email and Reports about Profanity

On June 18, at 8:25 a.m., Lowman sent an email to the NDI staff stating she had just spent 20 minutes cleaning the kitchen sink and it "was probably the grossest thing I have ever done . . . not exaggerating." She described molding lemon peels, some crickets, and dirty dishes covered in poured-out coffee. She asked the staff to clean up after themselves "so that we do not create a new habitat for creepy crawlies in our sink again." She ended with a thank you, followed by a smiley face. (R. Exh. II.)

That same morning, in the hallway of the dance barns, Orozco-Garrett approached Rachel Carpenter, NDI's north program producer, and started talking about how pitiful Lowman's email was. Orozco-Garrett told Carpenter that Lowman had nothing better to do but complain about the sink, and said she'd cleaned up more shit than Lowman ever had. According to Carpenter, Orozco-Garrett repeatedly used the F-word. Carpenter tried to use her body language to convey she was not interested in talking with Orozco-Garrett, and eventually told her she needed to get back to work. (Tr. 681–682.) There were not parents or students nearby during this conversation. (Tr. 507, 692.)

Later that day, Carpenter and Briggs were directing children to their studios, and Orozco-Garrett approached. There were parents and children in the vicinity, and Orozco-Garrett began swearing. (Tr. 683–684; GC Exh. 18.) That same afternoon, NDI Residency Director Hannah Foss and Carpenter were setting up T-shirts to sell at a table in the dance barns. Orozco-Garrett came in and helped set up the T-shirts. She started talking about Lowman's email again, using swear words, and saying she was going to buy cockroaches to put in the sink. Class was just ending and there were parents and volunteers around. (Tr. 685–686; GC Exh. 18.) That afternoon, Carpenter approached Lowman to tell her what had transpired. Lowman directed her to Salganek. (Tr. 689.)

On June 19, Carpenter reported to Salganek the incidents that had occurred the prior day. (Tr. 305.) Carpenter reported that she felt Orozco-Garrett was belittling, bullying, and mocking Lowman. (Tr. 311; R. Exh. JJ.)

On July 13, Salganek sent Orozco-Garrett an email stating that she and Carpenter had met regarding some comments Orozco-Garrett had made to Carpenter. Salganek informed Orozco-Garrett that her comments had made Carpenter feel uncomfortable, and Carpenter thought they were personally demeaning to Lowman. Salganek reminded Orozco-Garrett about their previous conversation about the voodoo doll comment. Salganek requested to meet with Orozco-Garrett before deciding whether her comments about Lowman were inappropriate. (GC Exh. 15.)

Orozco-Garrett responded the same day, stating that Salganek's letter violated the settlement agreement in her previous case. She expressed her belief that she had the right to discuss supervisory personnel, and noted that there have been cases holding that calling a supervisor an "asshole" was protected. She concluded by stating, "You clearly do not know the scope of protected employee activity under the NLRA, just as you do not understand the concept of insubordination" and added that she was forwarding Salganek's email to the NLRB. (GC Exh. 17.)

At Salganek's request, on July 14, Carpenter and Briggs sent Salganek emails regarding their interactions with Orozco-

[15] At Salganek's request, Ladas also forwarded an email describing what she observed. (R. Exh. O.)

Garrett on June 18.[16] (R. Exh. KK; GC Exh. 18; Tr. 310.)

On July 31, Salganek sent Orozco-Garrett another email reiterating her belief that the comments Orozco-Garrett had made about Lowman were intended to belittle and humiliate her. Salganek informed Orozco-Garrett that she believed the comments were insubordinate and in violation of NDI's standards of professional conduct. She also expressed her belief that Orozco-Garrett's July 13 response was insubordinate because she was attempting to investigate a complaint and she was met with defiance and disrespect. Salganek reminded Orozco-Garrett of the terms of her probation, and informed her she was copying Baker and they would discuss possible discipline. (R Exh. U.)

Orozco-Garret responded on August 3, with Baker cc'd, stating she was forwarding Salganek's July 31 email to the NLRB, and expressing her belief that it violated the settlement agreement and constituted a threat based on her protected concerted activity. Orozco-Garrett again broke her response into sections. In Section I, she expressed her displeasure with how the Sweeney matter that led to her probationary status had been handled. In Section II, she denied using foul language within earshot of students and stated she had not been informed of what she allegedly had said. In Section III, Orozco-Garrett pointed out that others had made comments about Lowman, expressed her belief that Lowman perpetrates negative talk, and stated she thought there was a different standard for Hispanics. In Section IV, Orozco Garrett opined that Lowman's characterization of her behavior as insubordinate was an illegal characterization of her employee rights, and reminded Lowman that during settlement negotiations she was required to remove language in a disciplinary letter requiring her to be respectful in her interactions with management. In Section V, Orozco-Garrett said Salganek had tried to make it seem like she had called Lowman and "asshole." Orozco-Garrett clarified that she "was simply making you aware of the principle that civility in the workplace is dead before the NLRB." She cited to a Board case, as follows:

> In *Plaza Auto Center, [I]nc*., 360 NLRB No. 117 (2014), the NLRB Board ruled that an employer violated the NLRA when it terminated an employee for cursing at his employer in a meeting about his pay. The employee called the owner, in a meeting with his manager, a "fucking crook" and an "asshole"; told the manager that the owner of the company was "stupid" and that nobody liked him; and shoved his chair and said that if the company fired him, they would regret it. *They did*.

(Emphasis in original.) In Section VI, Orozco-Garrett faulted Salganek for relying on a portion of the employee handbook that had yet to be distributed and opining that even if the language for the revised employee handbook had been approved by the Board, it was too broad and vague to be enforceable. Finally, in Section VII Orozco-Garrett stated that, in her view, she was no longer on probation because her probationary period ended on the last day of school in May. Orozco-Garrett concluded by stating that she would not meet with Salganek until she was advised of the factual content of the allegations against her. (R. Exh. V.)

On August 5, Wolfe informed management not to firm up any schedules that included Orozco-Garrett or St. Clair as instructors for the upcoming school year until Baker finished his investigations. (R. Exh. W.)

On August 25, Baker issued St. Clair a letter about her behavior that was also sent to her personnel file. (Tr. 188–189; R. Exh. Y.)

Also on August 25, Orozco-Garrett sent a text stating, "The grossest thing she's ever done, 'not exaggerating' Ok, I've cleaned up barf, urine, kid poop . . . all at NDI. I was thinking of sending a response that the crickets were mine! They must have escaped! Poor crickets!"[17] (R. Exh. ZZ.)

Orozco-Garrett emailed Lowman on August 25 asking about her schedule for the school year. She said she expected a second class assignment because her probationary period had expired. Lowman forwarded the email to Baker, and expressed her opinion that Orozco-Garrett did not meet the terms of her probationary period. Lowman said it had been difficult to work as Orozco-Garrett's supervisor because she came to meetings late, wrote hateful emails, and spoke ill of her as a person, not just as a supervisor. She asked Baker to advise her on how to proceed. (R. Exh. AA.)

Salganek forwarded Carpenter's complaint to Baker. He spoke with Carpenter, Foss, and Briggs in connection with Carpenter's complaint. (Tr. 141–142, 149.) On August 27, Baker sent Orozco-Garrett an email about Carpenter's complaint. He reiterated Carpenter's allegations that Orozco-Garrett cussed in front of children, and stated that Foss reported she had a similar experience with Orozco-Garrett cussing in front of children. Baker asked Orozco-Garrett to send any response to him by the end of the day on August 28. (GC Exh. 21.)

On August 28, Orozco-Garrett responded, expressing at the outset her belief and incredulity that Baker and Salganek were blatantly violating the settlement agreement. She denied that she cussed in front of children or parents, and asserted that Baker and Salganek were fabricating the factual allegations. She requested the names of the parents and students and factual statements from them regarding what they heard. Orozco-Garrett then gave examples of other instances where foul language was used in front of children but no action was taken. (GC Exh. 22.) On August 31, Baker emailed Orozco-Garrett and asked for the names of any witnesses she would like him to interview in connection with Carpenter's complaint. He also expressed that he was unaware that other employees had used foul language in front of children and asked her to provide information so he could look into the matter. (GC Exh. 23.) On August 31, Orozco-Garrett's husband hand-delivered to Doniger a letter outlining Orozco-Garrett's complaints against the Respondent and asking NDI's Board of Directors to address them. (GC Exh. 24; Tr. 525.)

On September 2, Orozco-Garrett sent Baker a letter setting

[16] Briggs asked Salganek not to mention her by name if possible when Salganek discussed the incident with Orozco-Garrett.

[17] Orozco-Garrett could not recall to whom she sent the text. (Tr. 646.)

forth her view that she could not respond to the shifting allegations against her with regard to her conversation with Carpenter. She gave examples of other employees' conduct and expressed her belief she was being treated disparately. With regard to Baker's request for information regarding employees who had used profanity in front of children, Orozco-Garrett gave some examples without referencing names, and informed him if he was unaware of these incidents it was because he had divorced himself from everyday teaching responsibilities and employed managers who conduct themselves far worse than anything alleged in the complaint against her. She added, "All details, including name (sic) of offenders, of the above scenario will be made public should you persist in this claim and it becomes necessary to litigate it in federal court." (GC Exh. 25.)

NDI did not receive complaints from parents or students about Orozco-Garrett's language. (Tr. 179.)

On September 3, Doniger responded to Orozco-Garrett's letter, informing her she would bring her concerns to the Board of Directors, and notifying her that the Board's governance committee was reviewing the employee handbook. (GC Exh. 26.)

G. Revised Employee Conduct Policy

The employee conduct rule was revised on September 3, and renamed "Expectations for Employee Conduct." It was incorporated into a revised employee handbook. (GC Exh. 37.) The revised rule states, in relevant part:

> Expectations for Employee Conduct
>
> Being insubordinate, threatening, intimidating or disrespectful to managers, supervisors, coworkers, or any other individual in the course of conducting business will result in discipline, up to and including termination.

NDI added the following language at the end of the rule:

> Note that all employees have rights under the NLRA to engage in protected concerted activities including discussing your terms and conditions of employment, wages or benefits or work conditions. Nothing in this policy is meant to, nor should it be interpreted to, in any way limit your rights under any applicable federal, state, or local laws, including your rights under Section 7 of the National Labor Relations Act, including but not limited to the right to engage in protected concerted activities with other employees for the purposes of their mutual aid and/or protection, or to improve terms and conditions of employment, such as wages and benefits.

The previous page states:

> The National Labor Relations Act (NLRA) gives employees, among other rights, the right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with non-employees. The NLRA also gives employees the right to argue and debate with each other about unions, management and their terms and conditions of employment. None of NDI-New Mexico's rules, regulations or policies, including but not limited to those in this Handbook, should be construed as prohibiting such employee discussions or rights.

(GC Exh. 37, pp. 9–10.)

H. The Charging Party's Termination

Baker prepared the summary of his investigation into Carpenter's complaint about Orozco-Garrett on September 3. After speaking with Carpenter, Baker concluded that Orozco-Garret's comments "were rude and intended to belittle and humiliate Emily and were motivated by your personal animosity toward her [Lowman] rather than any attempt to discuss your working conditions." He determined her conduct was insubordinate and in violation of NDI's standards of professional conduct, which state:

> NDI New Mexico requires all employees to adhere to the highest standards of conduct in their appearance, behavior, language and mannerisms when representing NDI New Mexico, whether on or off NDI New Mexico premises. Please keep in mind that as a representative of NDI New Mexico, you are inherently a role model for the children and families we serve.

Baker summarized his interviews with Salganek, Carpenter, Briggs, and Foss, as well as the emails from Orozco-Garrett. He considered the earlier complaint involving the EA at Gonzales Elementary, and recommended Orozco-Garrett's termination. (R. Exh. BB; Tr. 257.) Baker also independently recommended Orozco-Garrett's termination based on his investigation into the complaint from Robledo. (R. Exh. A.)

Orozco-Garrett was terminated September 4. Her letter of termination, signed by Baker, references that she was on probation for the 2014–2015 school year following the complaints she was rude to staff at Sweeney Elementary School. The letter then references the complaint about the visually impaired student and the EA, as well as Carpenter's complaint, detailed above. The final paragraph states:

> You have acted disrespectfully, unprofessionally, and inappropriately toward members of the NDI New Mexico community, including the children we serve. You refuse to accept constructive criticism directed toward improvement of your performance or to take responsibility for your behavior. Instead, you blame others and are combative rather than cooperative, and have repeatedly shown that you are unwilling to change. Such conduct is unacceptable and disruptive. Therefore, I am terminating your employment with NDI New Mexico effective immediately.

The letter concludes by instructing Orozco-Garrett to make arrangements to turn in her key and any other possessions that belong to NDI. (GC Exh. 27.) Baker was the decisionmaker. (Tr. 193.)

On September 8, Orozco-Garrett filed a notice of appeal and complaint with NDI's Board of Directors. (GC Exh. 28.) On September 30, NDI's attorney responded that because Orozco-Garrett was not an employee, she was no longer covered by the employee handbook and the Board would not consider her appeal. (GC Exh. 30.)

III. DECISION AND ANALYSIS

A. Witness Credibility

A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness'

demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp*., 179 F.2d 749 (2d Cir. 1950).

In evaluating the various different versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. See, e.g., *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Testimony or other evidence in contradiction to my factual findings has been carefully considered but discredited. Where there is inconsistent evidence on a material point, my credibility findings are incorporated into my legal analysis below.

B. Protected Concerted Activity

Complaint paragraph 4(a) alleges that around March 2015, Orozco-Garrett engaged in concerted activities with other employees for the purposes of mutual aid and protection by discussing the Respondent's working conditions, including, but not limited to, criticizing artistic choices made by management during staff meetings and criticizing management workplace decisions.

"To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). For the reasons set forth below, I find Orozco-Garrett's complaints criticizing management were neither concerted nor protected.

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887. An individual employee's complaint is concerted if it is a "logical outgrowth" of the concerns of the group. *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 3 10 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).

I find Orozco-Garret's complaints criticizing management's artistic choices were not concerted. Orozco-Garrett failed to show how her suggestions about the artistic direction of the year-end show, a highly subjective topic, would benefit her fellow employees.[18] The General Counsel argues, "It is axiomatic that a dance instructor's criticism of management's artistic choices for the end-of-year performances during a monthly preparation and choreography meeting of instructors and staff held for the purpose of preparing for those performances, are discussions of working conditions of all instructors and staff preparing for the performances." (GC Br. p. 25.) Merely raising suggestions in a group meeting does not prove that Orozco-Garrett's criticisms or suggestions about management's artistic choices were shared by other employees, however, or that other employees would see her suggested changes as benefitting them in any way.[19]

Aside from Orozco-Garrett's suggested changes to the year-end show, her other complaint involving management stems from Lowman's kitchen sink email. The General Counsel has not met its burden to show Orozco-Garrett's belittling of Lowman for her characterization of the filthiness of the kitchen sink was concerted activity. Not a single witness was called to testify that they took umbrage with Lowman's email. Indeed, the evidence shows that the employees with whom Orozco-Garrett ostensibly shared her disdain for Lowman's email did not share her viewpoint, and did not want to discuss the matter with her.[20]

Finally, there is no evidence that Orozco-Garrett's suggestions about the year-end performance or her comments about Lowman were geared toward group action.

Based on the foregoing, I find the General Counsel has failed to adduce evidence sufficient to establish Orozco-Garrett's complaints were concerted.

Even assuming Orozco-Garrett engaged in concerted activity, I find her comments were attenuated from wages, hours and other working conditions, and were therefore not protected. To be protected under the Act, the activity must relate to Section 7 rights. ["S]ome concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978). Simply put, it is difficult to see how Orozco's complaints were aimed at improving "the interests of employees qua employees." *G & W Electric Specialty Co*., 154 NLRB 1136, 1137 (1965).

The complaints at issue here largely concern Orozco-Garrett's impression that the year-end show did not address the needs and desires of the Hispanic community NDI serves. She

[18] In his brief, the General Counsel also asserts that Orozco-Garrett made suggestions "to rectify the communication problem that Spanish-speaking families have with Respondent." This was not alleged in the complaint, other than in a catchall manner. Counsel for the General Counsel elicited no testimony about this at the hearing, and the evidence both of any such communication problem and the nature and timing of Orozco-Garrett's attempts to rectify it is insufficient to consider the matter to have been fully litigated.

[19] This is true for all of her artistic suggestions. Indeed, the suggestion that her students be given more stage time would logically seem to benefit her at the expense of her coworkers.

[20] I note this was not a complaint to management or to an outside source, and it was only brought to management's attention because Carpenter reported it.

was acting in the interest of her constituents which, while admirable, is not protected activity under the Act. I find this case very similar to *Waters of Orchard Park*, 341 NLRB 642 (2004), where two nursing home healthcare workers expressed concerns about the quality of patient care. The Board found they were not engaged in protected activity because their complaints "were concerned about the quality of the care and welfare of the residents, not their own working conditions." The complaints in both this case and *Waters of Orchard Park* concerned effects on customers or constituents, not the conditions under which work was performed.

In addition, classroom instruction culminating in the year-end show is, for all intents and purposes, NDI's "product." As stated by Member Meisburg in his concurring opinion in *Waters of Orchard Park*, "Although employee interest in that product is desirable, it is not thereby converted into a working condition. Factory workers, too, may manifest a strong interest in the goods they produce, but the nature of those goods is not a condition of employment . . ." Id. at 645–646. Here, Orozco-Garrett's suggestions about the artistic direction of the program were focused on the quality of NDI's product. "In general, 'employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope' of Section 7." *Riverbay Corp.*, 341 NLRB 255, 257 (2004) (quoting *Lutheran Soc. Services of Minnesota*, 250 NLRB 35, 41 (1980)). The quality of the "product" is among these managerial prerogatives that are "not encompassed by the 'mutual aid or protection' clause." 250 NLRB at 42.

The General Counsel cites to *Enterprise Products*, 264 NLRB 946, 948 (1982), for the proposition that, "It is settled that 'when the exercise of a function of management affects conditions of employment, the employees have a right to protest the particular action taken.'" (quoting *Hagopian & Sons, Inc. v. NLRB*, 395 F.2d 947, 951 (6th Cir. 1968). (GC Br. p. 25.) The protested management action in the cited portion of *Enterprise Products*, however, was suspension of a wage increase, a matter squarely within Section 7's purview.

With regard to the complaints stemming from Lowman's email, I note that Orozco-Garrett did not take issue with Lowman's request for employees to keep the sink clean. Instead, she derisively expressed her surprise that the kitchen sink was the dirtiest thing Lowman had ever seen. These expressions were not protests or complaints about working conditions, but were instead personal jabs at Lowman for her characterization of the sink. See *Lutheran Social Services*, supra.

In analyzing another complaint allegation, i.e., whether Salganek's July 31 email violated the Act, the General Counsel argues that Orozco-Garrett's comments about Lowman's kitchen sink email were protected based on Board precedent. The General Counsel first cites to *Millcraft Furniture Co*., 282 NLRB 593, 595 (1987). That case, however, involved conduct in connection with a concerted decision among employees regarding a work stoppage, and is therefore not on point. The General Counsel next points to *Fair Mercantile Co.,* 271 NLRB 1159, 1162–1163 (1984), where two employees together presented their complaints about their office manager's manner of assigning work and alleged favoritism to upper management, and is likewise not on point. Finally, the General Counsel points to *Calvin D. Johnson Nursing Home*, 261 NLRB 289, 289 fn. 2 (1982). There, the Board noted that complaints about how employees are treated by their supervisors are protected. As noted directly above, Orozco-Garrett did not complain that Lowman was unfairly requiring employees to keep the kitchen sink clean, but she instead mocked Lowman's description of the sink. Her words "had no substantive content or value that could have assisted" in furthering a protected cause. See *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 212 (4th Cir. 2005).

Based on the foregoing, I find the General Counsel failed to establish Orozco-Garrett engaged in activity protected by Section 7, as alleged in complaint paragraph 4(a).

C. The Charging Party's Fall Class Schedule and Termination

Paragraph 4(d) and alleges that around August 2015, the Respondent failed to assign Orozco-Garrett classes for the Respondent's Fall Program. Paragraph 4(e) alleges that on September 4, 2015, the Respondent discharged Orozco-Garrett. Both allegations, through paragraphs 4(f), (g), and (h), assert that the actions were unlawful retaliation for protected concerted activity and for filing previous charges, and were based on application of overly-broad rules. Because the allegations in paragraphs 4(d) and (e) largely rest on of the same facts, they are analyzed together.

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co*., 124 NLRB 146, 147(1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American. Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

1. Previous charges—Section 8(a)(4) and (1)

Under Section 8(a)(4), it is unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." In analyzing this allegation, I follow the procedure set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). See *American Gardens Management Co.*, 338 NLRB 644 (2002) (Board applies *Wright Line* to allegations under Section 8(a)(4)). To prove a violation under *Wright Line*, the General Counsel must make an initial showing "sufficient to support the inference that protected conduct was a 'motivating

factor' in the employer's decision." 251 NLRB at 1089. If this is accomplished, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id.

Unlawful employer motivation may be established by circumstantial evidence, including, among other things: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices; (3) statements and actions showing the employer's general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc*., 332 NLRB 251, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc*., 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc*., 328 NLRB 1107 (1999) (statements showing animus); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999)(disparate treatment); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment).

The lack of meaningful investigation into the incident may be further evidence of unlawful motivation. "The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are [likewise] clear indicia of discriminatory intent." See *New Orleans Cold Storage & Warehouse Co.,* 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir.2000). Another indicator of unlawful motivation is shifting explanations for a personnel action. See *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").

It is undisputed that Orozco-Garrett filed charges with the Board in Case 28–CA–136974, about which the Respondent knew. The timing of the Respondent's decisions to delay scheduling Orozco-Garrett for classes and terminating her occurred shortly after the complaint generated by Orozco-Garrett's previous charges was settled.

The General Counsel points to disparate treatment, noting that St. Clair was treated more favorably even though she allegedly committed the same infraction.[21] With regard to the Respondent's decision to withhold putting them on the schedule for fall classes pending investigation into the complaints against them, St. Clair and Orozco-Garrett were treated the same. With regard to the termination, Orozco-Garrett was terminated and St. Clair was not, and thus they were treated differently.

The General Counsel further asserts the "Respondent reacted to Orozco-Garrett's concerns with hostility over her disagreement with Respondent's artistic choice by opting to "keep the script as is." (GC Br. p. 4.) It is hard to comprehend how the Respondent's decision not to take Orozco-Garrett's advice regarding choreography shows hostility for filing previous charges.

As evidence of pretext, the General Counsel contends that the fact that Orozco-Garrett taught during the summer shows that the Respondent knew the allegations against her with regard to grabbing Robledo were false. Baker explained this, however, stating that when the decision to schedule her for the summer was made, he did not have enough information to understand the allegations against her, and had thought Orozco-Garrett might provide an explanation if she met with him. (Tr. 154.) Given the wealth of evidence regarding the Robledo incident, discussed above in the statement of facts, and the Respondent's repeated attempts to meet with Orozco-Garrett about it, any inference that the Respondent knew it did not occur lacks support.

The General Counsel also asserts that the Respondent's failure to conduct a meaningful investigation shows the Respondent's discriminatory intent. I disagree because the record is clear that Baker repeatedly tried to meet with Orozco-Garrett to discuss the Robledo incident and Orozco-Garrett repeatedly thwarted his attempts to do so. The evidence fails to show that the Respondent sought to shape or distort the investigation, or that there was not genuine fact gathering.[22] The same holds true for the Carpenter complaint. Salganek asked to meet with Orozco-Garrett, who in turn responded by telling Salganek she had violated the settlement agreement and she did not understand the scope of protected activity. Despite Salganek asking Orozco-Garrett to provide times when she could meet, Orozco-Garrett did not respond with any suggested meeting times.

In its analysis of whether Salganek's July 31 email to Orozco-Garrett constituted promulgation of an overly-broad rule, the General Counsel asserts that the Respondent provided shifting explanations for Orozco-Garrett's termination based on Carpenter's complaint. The evidence does not support this, however. While I agree that initially Salganek informed Orozco-Garrett that Carpenter had complained to her about Orozco-Garrett's comments mocking Lowman, it is clear that upon investigating the matter, Carpenter also complained about Orozco-Garrett's language in front of parents and students. There was no action taken against Orozco-Garrett until she was informed of these allegations and permitted an opportunity to respond.

Based on the foregoing, I find the General Counsel has failed to meet the initial burden to prove that the Respondent's decision to hold off on scheduling Orozco-Garrett for fall classes

[21] Though these arguments were made in the portion of the General Counsel's brief regarding protected concerted activity, they are applicable to the allegation regarding previous charges.

[22] In this regard, I credit Baker's undisputed testimony that he spoke to the individuals enumerated in the statement of facts and held the belief that the incident occurred as reported to him. Baker's testimony was consistent and he did not strike me as disingenuous.

violated Section 8(a)(4) and (1). I find, however, based on the evidence of timing and the more favorable treatment St. Clair received for committing a similar infraction, the General Counsel has met his initial burden with regard to Orozco-Garrett's termination.

To rebut the inference that Orozco-Garret's termination was motivated by retaliation for her previously-filed charges, the Respondent must prove, by preponderant evidence, that it would have terminated her even had she not filed charges. For the reasons that follow, I find this burden has been met.

The evidence shows that, in the wake of Orozco-Garrett's probation for her conduct toward the staff at Sweeney, the Respondent was faced with similar complaints about her behavior.

With regard to the grabbing incident at the year-end performance, the evidence is clear that Salganek received a report that Orozco-Garrett grabbed Robledo and bruised her. The General Counsel points out that the Respondent failed to call Robledo as a witness. Both the Charging Party and the Respondent assert that Robledo would support their respective versions of events, however, so I draw no conclusions from the failure of any party to subpoena her testimony. Moreover, any argument that the Respondent is required to prove the incident actually occurred as reported to Salganek and Montoya misapprehends the Respondent's burden. See *Fresno Bee*, 337 NLRB 1161, 1182 (2002). The information Baker gathered, which included speaking with several individuals and the written responses from Orozco-Garrett, was sufficient for the Respondent to form a good-faith belief that the incident between Orozco-Garrett and Robledo occurred as reported to Salganek and Montoya.[23]

The General Counsel notes that Orozco-Garrett had an injury to her left arm and was much smaller than Robledo, and asserts this should lead to an inference that the grabbing incident could not have occurred. Had the allegations been that Robledo's bruise was the result of Orozco-Garrett somehow overpowering her by force using both of her arms, this argument would be more compelling. As it stands, however, an injury to one of Orozco-Garrett's arms and the respective sizes of Robledo and Orozco-Garrett do not suggest that the Respondent should have believed Orozco-Garrett's denial that she grabbed Robledo, or her claim that she was physically incapable of doing so.

Turning to the Carpenter complaints, I fully credit Carpenter's testimony regarding what occurred and what she reported. She testified in a very straightforward manner, and it was clear to me she reported the conduct to management because it bothered her, not because she was somehow set up as a pawn for the Respondent. Where Carpenter's testimony differs from Orozco-Garrett's, I credit Carpenter. In addition to her demeanor, Carpenter's testimony is worthy of belief because she has nothing to gain or lose by being honest. There is no reliable evidence that she was coerced in her testimony or that she had incentive to embellish it. I find the Respondent believed Carpenter's complaint, and legitimately considered it as grounds for termination. See *Good Samaritan Hospital*, 265 NLRB 618, 627 (1982).

With regard to the different treatment accorded to St. Clair, I find the Respondent has established there were meaningful distinctions between St. Clair and Orozco-Garrett justifying different responses. Most significantly, the only complaint against St. Clair concerned her contact with Lussiez at the year-end performance. Orozco-Garret's discipline, by contrast, was evaluated based on the complaints from both Robledo and Carpenter. Moreover, Orozco-Garrett had previously been placed on probation for her conduct at Sweeney. In short, the complaints regarding Orozco-Garrett demonstrated a pattern of behavior inconsistent with NDI's mission and values that had persisted despite efforts to correct it.[24]

Based on the foregoing, I find the Respondent has met its burden to prove that it would have terminated Orozco-Garrett's employment even had she not filed previous charges.

2. Protected activity—Section 8(a)(1)

Because I have found that Orozco-Garrett did not engage in protected concerted activity, I find the allegations resting on this theory fail and recommend their dismissal. In the event a reviewing authority disagrees with me, however, I incorporate my analysis above, and find the Respondent would have terminated Orozco-Garrett's employment even had she not engaged in protected concerted activity.

The General Counsel asserts that the record contains substantial evidence of animus toward Orozco-Garrett based on her protected concerted activity. (GC Br. p. 26.) First the General Counsel points to Salganek's July 31, 2015 email to Orozco-Garrett, asserted that it prohibited employees from discussing work issues with coworkers, and from protesting management's decisions and threatened employees if they violated the defunct standards of professional conduct policy. (R. Exh. U.) While the email references a portion of the rescinded standards of professional conduct policy, it does not instruct Orozco-Garrett to refrain from discussing work issues or protesting management's decisions. The email does reference the policy and concludes with Salganek stating that she and Baker would discuss possible discipline based on Orozco-Garrett's comments about Lowman and her defiant and insubordinate response to Salganek's July 13 request to meet to discuss Carpenter's complaint. I find the July 31 letter was not borne out of animus, but instead was part of the Respondent's attempt to address the complaint from Carpenter about Orozco-Garrett's conduct, and it was an appropriate response to Orozco-Garrett's July 13 email.

[23] I credit the testimony of Montoya regarding her description of what was reported to her at the wrap-up meeting at Gonzales Elementary of her documentation of it. (Tr. 672–675.) Her testimony was open and appeared to me to be an honest account of what had been a surprising and thus memorable event. It is also corroborated by Salganek's account of what Robledo reported to her. I find the Respondent has established the minutes Montoya took at the wrap-up meeting (R Exh. M) constitute a record of a regularly-conducted business activity under Federal Rule of Evidence 803(6). Even if they are considered hearsay, however, they are corroborated by reliable evidence which I have credited herein. See *RC Aluminum Industries, Inc*., 343 NLRB 939, 940 (2004).

[24] This pattern was present regardless of whether or not Orozco-Garrett's probationary period had expired. I also note that Wolfe provided unrefuted testimony regarding other employees who were disciplined and/or terminated for conduct similar to Orozco-Garrett's. (Tr. 699–703.)

In any event, assuming the July 31, 2015 email is evidence of animus, for the reasons set forth in my analysis above, the Respondent has proved it would have terminated Orozco-Garrett based on the complaints it received about her and what was gleaned from the ensuing investigations.

3. Reliance on overly broad rules—Section 8(a)(1)

The General Counsel asserts that Orozco-Garrett was terminated because she violated Salganek's July 31 email and the overly-broad employee handbook rule.

The Board has long held that discipline for violating an unlawfully overbroad rule may violate the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). The Board recently clarified that such discipline is unlawful when an employee violates the rule by "(1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." *The Continental Group*, Inc., 357 NLRB 409, 412 (2011).

As discussed below, I find the email and the handbook rule are not overly-broad, and on that basis this allegation fails. Moreover, as discussed at length herein, I find Orozco-Garrett did not violate either rule by engaging in conduct protected by Section 7 or implicating its concerns.

Because I find Orozco-Garrett's termination was legitimately motivated and not premised on violating unlawfully overbroad rules, I recommend dismissal of complaint paragraphs 4(d) and (e).

D. Alleged Unlawful Rules

1. Expectations for Employee Conduct

Complaint paragraph 4(c) alleges that since September 3, 2015, the Respondent has maintained and enforced the following overly-broad and discriminatory rule in its Employee Handbook:

> Expectations for Employee Conduct
>
> Being insubordinate, threatening, intimidating or disrespectful to managers, supervisors, coworkers, or any other individual in the course of conducting business will result in discipline, up to and including termination.

The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 5 (2014).

Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union or other protected activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber*, 238 NLRB 1323, 1324 (1978).

The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, supra at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage,* supra at 646.

The Expectations for Employee Conduct rule does not explicitly restrict Section 7 rights, nor does the General Counsel assert it was promulgated in response to protected activity or has been applied to restrict the exercise of Section 7 activity.[25] The General Counsel asserts employees would construe to rule as restricting their Section 7 activity.[26] For the following reasons, I disagree.

I find the Expectation for Employee conduct rule is not overly-broad when read in context. The rule is limited to conduct "in the course of conducting business," which limits the prohibition to conduct that would interfere with the Respondent's legitimate business concerns. See *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 (2014). The rule also contains clear and conspicuously placed limiting language. The last paragraph of the rule, which appears on the same page as the disputed provision, states:

> Note that all employees have rights under the NLRA to engage in protected concerted activities including discussing your terms and conditions of employment, wages or benefits or work conditions. Nothing in this policy is meant to, nor should it be interpreted to, in any way limit your rights under any applicable federal, state, or local laws, including your rights under Section 7 of the National Labor Relations Act, including but not limited to the right to engage in protected concerted activities with other employees for the purposes of their mutual aid and/or protection, or to improve terms and conditions of employment, such as wages and benefits.

(GC Exh. 37, p. 10.) The previous page also contains a statement describing employees' rights under the Act, including the right to argue and debate about working conditions, and explicitly states that no rule should be construed as prohibiting such discussions or rights. (GC Exh. 37 p. 9.) This language spells out that discussions and complaints about working conditions, including the right to argue and debate about working condi-

[25] Though the revised rule was promulgated in an effort to settle charges that the previous rule was overly-broad, obviously this is not the type of unlawful promulgation in response to protected activity the Board seeks to circumscribe. To find otherwise would punish employer attempts to settle complaints.

[26] The General Counsel primarily relies on Memorandum GC 15–05, which is not binding precedent.

tions, are not prohibited by the rule. Moreover, limiting language is written in a manner that does not require legal skill or training to understand.

It is undisputed that NDI's employees, in the course of conducting NDI's business of providing dance instruction to a vulnerable population, are expected to conduct themselves as role models for the children they serve. Given the context of Expectations for Employee Conduct rule, read together with the limiting language clearly excepting protected Section 7 activity, both within the rule itself and on the previous page, I find a reasonable employee would not construe the rule as restricting his or her rights under the Act. Accordingly, I recommend dismissal of complaint paragraph 4(c).

2. Salganek's July 31 email

Complaint paragraph 4(b)(1) alleges that, by Salganek's July 31, 2015 email, the Respondent promulgated an overly broad and discriminatory rule that prohibited employees from discussing work issues with fellow employees and from protesting workplace actions arising from the Respondent's management.

The framework set forth directly above with regard to the Expectations for Employee Conduct applies to this allegation.

The General Counsel's argument in support of this allegation is less than clear. It starts by mischaracterizing the July 31 email, stating:

> On July 31, Respondent e-mailed Orozco-Garrett it considered her conduct in communicating disagreement with and protesting Director Lowman's decision to send a group e-mail regarding the dirty cantina sink insubordinate and in violation of Respondent's defunct and rescinded Standards of Professional Conduct.

(GC Br. 21.) Orozco-Garrett did not protest Lowman's decision to send the email, however, but rather mocked Lowman's description of the sink, as set forth fully above. Salganek's July 31 email took issue with the nature of Orozco-Garret's comments to Carpenter (about which Carpenter complained) that Salganek determined were based on personal animosity rather than an attempt to discuss working conditions.[27]

The General Counsel next argues that Orozco-Garret's comments about Lowman's kitchen sink email were protected, and argues there was unlawful motivation behind the email. As detailed above, I have found the comments were not concerted or protected, and in any event the protected nature of the comments as well as evidence of animus do not play into the analysis of whether or not a rule violates Section 8(a)(1).

Next, the General Counsel alleges that actions that distinguish among employees because they engage in protected concerted activity are inherently destructive of employee rights. More specifically, the General Counsel argues:

> Respondent's promulgation of the overly broad and discriminatory rule in its July 31 e-mail to Orozco-Garrett and its resulting second investigation of Orozco-Orozco-Garrett, in regard to her violating that rule by the manner in which she communicated disagreement with and protested Director Lowman's decision to send a group e-mail regarding the dirty cantina sink, is inherently destructive of Section 7 rights in that it can be inferred that Respondent's conduct was motivated by the desire to discourage such disagreement and protest. One is held to intend the foreseeable consequences of one's actions.

(GC Br. p. 23.) Again, this is not the analytical framework to assess whether a rule is overly-broad. Moreover, the authority the General Counsel relies upon is misplaced. The General Counsel cites to *Contractor Servs., Inc*., 324 NLRB 1254, 1258 (1977), which involved an employer who attempted to require union applicants to sign a form waiving their rights to engage in protection union activity as a condition of being hired.[28] This is meaningfully distinguishable from the allegedly unlawful rule here on many fronts.

The portion of the Standards for Professional Conduct cited in the July 31 letter states:

> NDI New Mexico requires all employees to adhere to the highest standards of conduct in their appearance, behavior, language and mannerisms when representing NDI New Mexico, whether on or off NDI New Mexico premises. Please keep in mind that as a representative of NDI New Mexico, you are inherently a role model for the children and families we serve.[29]

(R. Exh. U.)[30] This language does not on its face restrict Section 7 Activity. Because I have found that Orozco-Garrett's comments about Lowman's email were not protected concerted activity, I find any rule contained in the email was not promulgated in response to protected activity. On this same reasoning, I find it was not applied to restrict Section 7 activity.

I further find that a reasonable reading of the cited language would not lead NDI employees to believe their Section 7 activity was restricted. The plain intent is to ensure NDI employees adhere to its mission and values in the presence of the constituents it serves, which includes NDI employees acting as role models to students.[31] The nature of the Respondent's business and mission and its training of employees in this regard is extremely important when reasonably interpreting this email.[32] In a different context, as applied to employees not charged with being role models to underprivileged children, the rule may be

[27] Salganek's assessment in this regard is consistent with the great weight of the evidence.

[28] The General Counsel also cites to *Radio Officers v. NLRB*, 347 U.S. 17, 44–45 (1954), which involves discussion of intent in analyzing allegations under Sec.8(a)(3).

[29] This rule was voluntarily rescinded and revised pursuant to the settlement agreement.

[30] The General Counsel asserts that the promulgation of this rule was a prior unfair labor practice. No such finding has been made, however, as the rule was voluntarily rescinded pursuant to a settlement agreement.

[31] Orozco-Garrett does not dispute that instructors are expected to model NDI's principles. (Tr. 611.)

[32] As stated by Judge Ries in *Lutheran Social Services*, 250 NLRB at 43: "In a place of employment where the mission is to repair distressed young lives, where harmony and accord must certainly be of critically greater significance than in an ordinary industrial setting, disruption of that requisite environment by unstinting criticism deserves close consideration."

considered overly-broad.[33] As noted in the statement of facts, NDI employees are trained extensively on how to conduct themselves while representing NDI to its constituents and a reasonable employee would read the language cited in the email as requiring them to adhere to these legitimate standards. *Firestone Tire & Rubber*, supra.

Though not entirely clear, the General Counsel also appears to assert the Respondent promulgated an overly-broad rule by the portion of the email informing Orozco-Garrett of Salganek's belief that Orozco-Garrett's response to Salganek's request to meet with her was insubordinate. Salganek informed Orozco-Garrett of Carpenter's complaint on July 13 and requested to meet with her. Orozco-Garrett's response that same day is detailed in the statement of facts and discussed above. The General Counsel has failed to prove how characterization of Orozco-Garrett's response, which ignored the request to meet and essentially told Salganek she was ignorant, as insubordinate, is the promulgation of an overly-broad rule under any of the *Lutheran Heritage* criteria.

Based on the foregoing, I recommend dismissal of complaint paragraph 4(b)(1).

E. Alleged Threats of Reprisal

Complaint paragraph 4(b)(2) alleges the Respondent threatened its employees with unspecified reprisals if they violated the rule set forth in Salganek's July 31 email, in violation of Section 8(a)(1).

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

It is undisputed that Salganek's email threatened Orozco-Garrett with discipline for engaging in the kind of behavior that led to her probation. Specifically, the relevant portion of the email states:

> In September, 2014, you were told to improve your behavior and were warned that if you repeated improper behavior or if you ignored or violated any other policies, procedures or direction from your Program Director or senior management, you would be subject to disciplinary action, up to termination.

(R. Exh. U.) The General Counsel also argues that Salganek's statement that she and Baker would discuss possible discipline based on Orozco-Garrett's comments about Lowman and her response to Salganek's July 13 email constitutes a threat. Citing again to *Fair Mercantile,* supra, which I have distinguished above, the General Counsel asserts that "Orozco-Garrett's complaints and sarcastic comments about Director Lowman's group e-mail and that Lowman's statements in that e-mail were out of touch with reality or pathetic were protected" and argues that "when an employer threatens employees with discharge if they concertedly complain about wages, hours, or other terms and conditions of employment" it violates Section 8(a)(1). (GC Br. p. 24.)

I find Salganek's email does not violate Section 8(a)(1) because it does not threaten with regard to activity protected by Section 7, as detailed in the above analysis on Orozco-Garrett's alleged protected concerted activity. Accordingly, I find the General Counsel has not met his burden to prove the July 31 email was an unlawful threat, and recommend dismissal of complaint paragraph 4(b)(2).

CONCLUSIONS OF LAW

The Respondent's actions of failing to assign classes to Diana Orozco-Garrett and terminating her employment did not violate Section 8(a)(4) and (1) of the Act.

The Respondent did not promulgate, maintain, or enforce unlawful overly-broad work rules.

The Respondent did not unlawfully threaten its employees with reprisal for engaging in protected Section 7 activity.

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 10, 2016

[33] I make no specific finding in this regard.